

(2011) 06 CAL CK 0091

In the Calcutta High Court

Case No : Writ Petition No. 21177 (W) of 2007

K. Shankaraiah

APPELLANT

Vs

The Union of India (UOI)

RESPONDENT

Date of Decision : 09-06-2011

Acts Referred:

Border Security Force Act, 1968 — Section 2, 46, 47
Border Security Force Rules, 1969 — Rule 142(2), 143(3), 149, 48, 99
Criminal Procedure Code, 1973 (CrPC) — Section 4, 5
Penal Code, 1860 (IPC) — Section 344, 354

Citation : (2011) 06 CAL CK 0091

Hon'ble Judges : Ashoke Kumar Dasadhikari, J

Bench : Single Bench

Advocate : Kishore Dutta and Mintu Kumar Goswami, for the Appellant; Dilip Kr. Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

Ashoke Kumar Dasadhikari, J.—The Petitioner in this writ petition questioned the charge sheet dated 9th March, 2007 and Summary Security Force Court Trial dated 13th March, 2007 and the order of dismissal dated 13th March, 2007 as well as the order of the Appellate Authority dated 13th June, 2007 confirming the dismissal order as contained in Annexure P-6, P-7, P8 and P-11 respectively to the writ petition.

2. The Petitioner's case is that he was a Constable of 138 Bn, BSF. At the material time he was performing duties of security aid in the house of Amit Chand, Assistant Commanded 138 Battalion, BSF.

3. On 24th October, 2006 at about 1800 hrs. the Petitioner was standing near officers' mess with 15 months old baby (Ishu) of Shri Amit Chand. Several children playing in front of the mess while he was standing there one Master Siddarath, son of Shri Rajesh 21C (Adm) STC BSF NB and Miss Upasana Dey, daughter of Dr. Mrs. S. Dey, CMO, STC BSF NB started fighting on some issue

and the quarrel fought with them. Master Siddarath slapped Miss Upasana twice and thrice. Miss Upasana then started crying. Since he was standing there Miss Upasana came running to him and told that Siddarath has hit her. To console her, the Petitioner rubbed her cheek. In the meantime, Siddarath fled for scene. Therefore, Miss Upasana requested the Petitioner to drop her up to Mandir.

4. The Petitioner agreed with her request and dropped her up to Mandir. From Mandir Miss Upasana went her residential quarter and thereafter the Petitioner came back with Ishu in his hand. The Petitioner kept on roaming with little child (Ishu) in front of Officers' mess and Dr. Mrs. Bharati Sen's residential quarter. On the same day Dr. Mrs. S. Dey informed to the Assistant Commandant and thereafter, also to the Commandant, 138 Bn, BSF regarding the sexual abuse by the Petitioner upon her daughter Miss Upasana Dey and also lodged a written complaint against the Petitioner on 24th October, 2006.

5. On the basis of said complaint, the Commandant, 138 Bn, BSF issued the order of closed arrest under the provision of Rule 32 and 33 of the BSF Rules on 24th October, 2006 against the Petitioner and thereafter, by order dated 25th October, 2006 he was released from the said closed arrest on a condition that he will not leave to the campus area without taking permission from the competent authority till finalization of the case.

6. On the basis of the said complaint Staff Court of Enquiry was conducted by Shri Rabi Rajan 118 Bn, BSF by order dated 5th November, 2006, to enquire into circumstances under which the Petitioner, security aid to Amit Chand, sexually assaulted to Miss Upasana Dey while she was playing near Officers' mess. After conducting the Staff Court of Enquiry, the Presiding Officer submitted his findings and opinion that the disciplinary action may be taken against the Petitioner under the provisions of the BSF Acts and Rules. The said recommendation was accepted by the Deputy Inspector General, BSF on 15th November, 2006 and Inspector General on 5th December, 2006. On 14th December, 2006 the Commandant, 138 Bn, BSF initiated a proceedings under Rule 45 of the BSF Rule as per recommendation of the Staff Court of Enquiry and the Petitioner pleaded not guilty against the charges leveled against him u/s 46 of the BSF Act. The charges leveled against the Petitioner by a charge sheet dated 14th December, 2006 reads as follows:

BSF ACT SECTION 46 COMMITTING A CIVIL OFFENCE THAT IS TO SAY USING CRIMINAL FORCE TO A WOMAN INTENDING TO OUTRAGE HER MODESTY PUNISHABLE u/s 354 IPC In that he,

At Bn HQ Baikunthpur on 24/10/2006 1800 hrs used criminal force to Miss Upasana Dey(aged 06 years) daughter of Dr. (Mrs.) S. Dey, CMO, STC, BSF, North Bengal intending to outrage her modesty by such criminal force.

7. By an order dated 14th December, 2006 the Commandant, 138 Bn BSF directed for preparation of the record of evidence under Rule 48 of the BSF Rule.

8. After conducting the record of evidence the Recording Officer submitted his report to the Commandant for taking decision and the Commandant conveyed the Summary Security Force Court Trial against the Petitioner for committing an offence u/s 46 of the BSF Act which held on 13th March, 2007.

9. The Commandant issued a charge sheet on 9th March, 2007 upon the Petitioner u/s 46 of the BSF Act for committing an offence punishable u/s 354 of the Indian Penal Code. Summary Security Force Court Trial was held on 13th March, 2007 and the Petitioner pleaded guilty. The Summary Security Force Court awarded sentence which reads as follows:

Taking all these matter in consideration, I now sentenced the accused No. 940092763 rank constable K. Shankaraiah, D. Coy of 138 Bn, BSF to be dismissed from service." The Commandant by letter dated 13th March, 2007 communicated the order of dismissal.

10. The Petitioner preferred an appeal before the Director General, against the said order of dismissal dated 13th March, 2007 passed by the Summary Security Force Court for committing an offence u/s 46 of the BSF Act on 14th April, 2006. The Director General rejected the Petitioner's appeal dated 10th April, 2007 which was communicated to the Petitioner by an order letter dated 13th June, 2007.

11. Mr. Kishore Dutta, learned Counsel appearing for the Petitioner submitted that the order of dismissal passed by SSFC, dated 13th March, 2007 is an unreasoned order and, therefore, it should be quashed. He also submitted that SSFC is required to comply with rules of natural justice. He submitted that not recording of reasons by SSFC can not be cured by appellate authority. In support of his submission he relied upon a judgment reported in State of West Bengal Vs. Atul Krishna Shaw and Another, He contained that although it is a charge u/s 354 of the Indian Penal Code, no FIR was lodged, no investigation made by the local Police and not tried by the Criminal Court. He submitted that the offence u/s 354 is not triable by Summary Security Force Court which has no jurisdiction to decide. He referred Section 47 of Border Security Force Act, Section 4 and Section 5 of Code of Criminal Procedure and he further submitted that no steps could be taken by the Summary Security Force Court since the Petitioner was not in "Active Duty". He cited a decision reported in 2003 3 Cal HCN 82. He further submitted that the Petitioner, although admitted his guilt but recording of the same is not in consonance with Rule 142(2) of the BSF Rules he also submitted that Rule 143(2) (a) is also not complied with. He submitted that the procedural safe guard which is guaranteed, have not been followed. He cited a judgment reported in 1997 7 SLR 240. He also referred the judgments reported in State of West Bengal Vs. Atul Krishna Shaw and Another,

12. Learned Counsel for the Respondent appear and submit that the Petitioner being a member of the discipline force have used criminal force to Miss Upasana Dey, aged 6 years, (daughter of Dr. Mrs. S. Dey) and had sexually assaulted the

minor girl by inserting his hand in her T-shirt and forcing her to touch his private parts (Penis) by inserting her hand inside his pant, apart from kissing her on her cheek while saying bye near Mandir, while en route from Officers' complex to Mandir (Baikunthpur) to drop her house. The Petitioner has committed an offence punishable u/s 344 of Indian Penal Code which according to him is a civil offence u/s 46 of the Border Security Force Act and the Respondent authorities have jurisdiction to try and decide the same. He submitted that the civil offence is defined u/s 2 (d) of the Border Security Force Act. He further submitted that in the proceedings before the Summary Security Force Court no reasoned order is required to be passed he cited a Supreme Court judgment reported in AIR 2010 Supreme Court 1551 as well as an unreported judgment delivered by the Hon'ble Division Bench of this High Court in case of Shri Upandra Ray, Ex-constable No. 88161795 v. Director General, Border Security Force, Head Quarters. He submitted that the entire proceedings completed following the rules as well as the provisions law applicable therein. He also submitted that there is no violation of Rule 142 (2) or Rule 143 (2) (a) or any other rule or provision of the Act. According to him that the proceedings was concluded strictly in accordance with law and the order was passed by the Summary Security Force Court and, therefore, the writ petition should be dismissed.

13. I have considered the submissions made by the learned Counsel for the parties and perused the entire record as disclosed in the writ petition as well as in the opposition. A perusal of the documents show that lengthy statements have been recorded of Petitioner, Upasana Dey, Dr. Mrs. S. Dey and other witnesses. The Petitioner was allowed to cross examine all the witnesses. It appears that sufficient opportunity granted to the Petitioner. After following the detailed procedure as stipulated under the rules the SSFC have imposed punishment. The Hon'ble Supreme Court in case of (Union of India and Anr. v. Dinesh Kumar) (Supra) after considering the relevant rules of Border Security Force Rules have clearly held that the finding given by Summary Security Force Court need not be supported by reasons. It was held that though Rule 99 was amended requiring authority of General Security Force Court or Border Security Force Court to give reasons in support of their findings, no such amendment was made to Rule 149 which is applicable in case of SSFC. Rule 149 was left intact in contradistinction to Rule 99. The SSFC were not required to give reasons in support of their findings. It appears that whether the SSFC is required to give reasons was directly in issue before the Supreme Court in that matter and the Hon'ble Supreme Court have clearly held that the SSFC is not required to give reasons in support of their findings. I also find support from the judgment of the Hon'ble Division Bench rendered in case of (Shri Upandra Ray v. Director General, BSF) where in the Hon'ble Division Bench have held that no reason is required to be assigned by SSFC. I hold that the SSFC is not required to give reasons and, therefore, the argument advanced by Mr. Dutta as regards disclosing of no reason in the judgment of SSFC is of no merit and, therefore, the such submission is rejected.

14. Next contention raised by Mr. Dutta that the offence is u/s 354 of the Indian Penal Code, the Summary Security Force Court cannot try and determine the same. It is beyond the jurisdiction of the said Summary Security Force Court. Mr. Dutta referred Section 47 of Border Security Force Act, 1968 and he submitted that unless the Petitioner is on active duty he shall not be deemed to be guilty of an offence against this Act. Mr. Dutta submitted that Section 2 (a) active duty has been defined and the Petitioner was not in active duty at the material time and, therefore, he cannot be tried by the Summary Security Force Court. He also referred Section 4 and 5 of Criminal Procedure Code. According to Section 4 and 5 of Criminal Procedure, unless specifically excluded by any law any offence committed by person within the territory of this country should be dealt with in accordance with the mandate contained in the code. Mr. Dutta in support of his contention cited a judgment reported in 2003 Vol 3 CHN Page 82. He submitted that although the case cited is under Central Industrial Security Force "CISF" Act of 1968, but the principles decided therein is squarely applicable in the instant case of the petition. Learned Counsel for the Respondent on the other hand submitted that this is a civil offence u/s 46 of the Border Security Force Act, 1968. He further submitted that any person subject to this Act (Border Security Force Act, 1968) who had any place in, or beyond, India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charge therewith under this section shall be liable to be tried by a Security Force Court and, on conviction, be punishable under the Act. He submitted that civil offence has been defined u/s 2(d) of the Border Security Force Act, 1968 and as per the said section civil offence means an offence which is triable by a Criminal Court. Thus, he submits that as per Section 46 the Petitioner is triable under the said Act of 1968.

15. I have gone thorough the provisions u/s 4 and 5 of Code of Criminal Procedure as well as Section 46 and 47 and Section 2(d) of the Border Security Force Act. Upon considering the aforesaid provisions I am of the view that the offence committed u/s 354 Indian Penal Code is civil offence and the same is triable before the Summary Security Force Court. It also appears from the order of Director General BSF dated 13th June, 2007 that Petitioner was on active duty. It further appears that the statements recorded by the Petitioner on 8th November, 2006, shows that he was on active duty. Therefore, there is no doubt that the Summary Security Force Court have jurisdiction to try the offence committed by the Petitioner. Thus the point of jurisdiction taken by Mr. Dutta is also decided against the Petitioner.

16. Mr. Dutta argued further that the Petitioner admitted his guilt and he raised a question as to whether recording of such statement is in consonance of BSF Rules 242 (2). He further submitted that as per Section 143 (2) (a) fresh evidence is to be taken. Sub-rule (2) of Rule 142 reads as follows:

General plea of "Guilty" or "Not Guilty" - (1) The accused person's plea of "Guilty" or "Not Guilty" (or if he refuses to plead or does not plead intelligibly

either one or the other), a plea of "Not Guilty" shall be recorded on each charge.

(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the Court but before it is recorded, the Court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty and shall advise him to withdraw that plea if it appears from the record or abstract of evidence (if any) or otherwise that the accused ought to plead not guilty.

(3) Where an accused person pleads guilty to the first two or more charges laid in the alternative, the Court may after Sub-rule (2) has been complied with and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges as follow the charge to which the accused has pleaded guilty without requiring the accused to plea thereto, and a record to that effect shall be made in the proceedings of the Court.

Sub-rule (2)(a) of Rule 143 is quoted hereunder:

After the record of the plea of "Guilty" on a charge (if the trial does not proceed on any other charges) the Court shall read the record or abstract of evidence and annex it to the proceedings, or if there is no such record, or abstract, shall take and record sufficient evidence to enable it to determine the sentence, and the reviewing officer to know all the circumstances connected with the offence.

17. It is clear from the proceedings of Summary Security Force Court that both the aforesaid rules were complied with. The relevant portions as quoted hereunder show such compliance:

The Charge Sheet is read (translated), explained to the accused, marked B-2 signed by the Court and attached to the Proceedings.

ARRAIGNMENT

Q-1. Question to the Accused

How say you No. 940092763 CT Shankaraiah are you "Guilty" or "Not Guilty" or the charge, which you have heard read?

A-1. Answer by the accused

Guilty

Accused having pleaded Guilty to the charge, the Court read and explains to the accused the meaning of that charge to which he has pleaded Guilty and ascertains that the accused understands the nature of the charge to which he has pleaded Guilty. The Court also informs the accused the general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The Court satisfies itself that the accused understands the charge and the effect of that plea and the difference in procedure which will be followed

consequent to the said plea. The Court satisfies itself that the accused understands the charge and the effect of his plea of Guilty to the charge particularly the difference in procedure.

The provisions of BSF Rule 142(2) are complied with."

18. It also evident that after the record of the plea of guilt the Court read the record of evidence which is annexed to be proceedings and, therefore, there is compliance of Rule 143 (2) (a) of the said rules. The relevant portion as recorded by the Summary Security Force Court under Rule 143 (2) (a) reads as follows:

The accused No. 940092763 Rank Constable Name K Shankaraiah, "D" Coy of 138 Bn BSF is found Guilty of the charge.

The Record of Evidence is read (translated), explained and marked "K" signed by the Court and attached to the proceedings.

Q.2 Question to the accused

Do you wish to make any statement in reference to the Charge or in mitigation of punishment?

A-2 Answer by the accused

Sir, Whatever you want to do is acceptable to me.

Q.3 Question to the accused

Do you wish to call any witness as to character?

A-3 Answer by the accused

No.

In my view compliance of Rule 142 (2) and 143 (2) (a) is there. Thus, the allegation of violation of procedural safeguard, as contended by Mr. Dutta is also not proved. Accordingly the judgment cited by Mr. Dutta as reported in 1997 7 SLR 240 is not coming to any help. In view of the aforesaid finding the plea of non-compliance of Rule 142 (2) and Rule 143 (2) (a) is also rejected by this Court. The judgment cited by Mr. Dutta reported in 1999 2 CLT 107 Randhir Singh v. Union of India is not at all applicable in view of the fact that it appears from records that both the rules have duly been complied with.

19. Thus, after going to the all relevant records and papers which are disclosed in the instant proceedings I find that procedural safeguards have been maintained by the Respondent authorities and the Respondent authorities have taken all steps in compliance with the aforesaid two rules and as such there is no violation of Principles of Natural Justice.

20. In view of the aforesaid findings I do not find any substance in the submissions made by the learned Counsel appearing for the writ Petitioner and, therefore, this writ petition is dismissed. However, there would be no order as to

cost.